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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by

THE EFTA SURVEILLANCE AUTHORITY

represented by
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and Melpo-Menie Joséphidès
Department of Legal & Executive Affairs,
acting as Agents, in

CASE E-7/23

ExxonMobil Holding Norway AS

v

the Norwegian Government,
represented by the Tax Administration (Skatteetaten)

in which the Borgarting Court of Appeal (*Borgarting lagmannsrett*) requests the EFTA Court to give an Advisory Opinion under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on certain questions relating to the interpretation and application of Articles 31 and 34 EEA.

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1 INTRODUCTION AND FACTUAL BACKGROUND

1. This request ("**the Request**") for an advisory opinion has been made in proceedings between ExxonMobil Holding Norway AS ("**EMHN**"), a company established in Norway, and the Norwegian Government, represented by the Tax Administration (*Skatteetaten*).

2. In the 2012 fiscal year, EHMN claimed a tax deduction for a cross-border[1] group contribution of NOK 900,000,000. This group contribution was made to its loss-making subsidiary, ExxonMobil Danmark ApS ("**EMD**"), a Danish limited liability company. Group contributions are value transfers between companies in a group which, subject to certain conditions, allow the transferor to claim a deduction in connection with its income tax assessment. The contribution is then deemed to be taxable income for the recipient. The relevant Norwegian legislation at the time did not permit cross-border group contributions. EHMN however seeks to rely on the principles established in Case C-446/03 Marks & Spencer[2] and subsequent case-law, including that of this Court in Case E-15/16 Yara.[3] It claims that, because the losses of EMD were 'final' within the meaning of that case-law, EHMN should be allowed to deduct its group contribution to EMD - thus effectively obtaining relief for the losses sustained by EMD against EHMN's taxable income.[4]

3. By decision of 18 December 2014, the Tax Administration refused the deduction. It considered that, under the relevant Norwegian tax legislation, deductions were not permitted for group contributions made to companies tax resident outside Norway.[5] Alternatively, it considered that the losses made by EMD were not "*final losses*" within the meaning of the 'Marks & Spencer case-law.'[6]

[1] "*Cross-border*" is used in these written observations to mean between Norway and another EEA State, or between different EEA States, as the context requires.
[2] Judgment of the CJEU of 13 December 2005, *Marks & Spencer plc* v *David Halsey (Her Majesty's Inspector of Taxes)*, C-446/03, EU:C:2005:763 ("***Marks & Spencer***").
[3] Judgment of 13 September 2017, Case E-15/16, *Yara International ASA* v *the Norwegian Government* [2017] EFTA Ct. Rep. 434 ("***Yara***").
[4] i.e. the final losses sustained by EMD would reduce EHMN's taxable income, up to the amount of the group contribution paid by EHMN to EMD.
[5] The precise legislative conditions are set out in the Request, p.5.
[6] Request, p.4.

4. This Court and the CJEU have already had occasion to clarify and interpret the conditions first set out in Case C-446/03 Marks & Spencer. Under those, exceptional, conditions, a parent company may deduct from its taxable profits in one EEA State losses sustained by its subsidiary in another EEA State, provided it can demonstrate that the losses of the subsidiary are "final"[7] or "definitive"[8] ("**the final loss exception**"). Where losses are *not* final, States may be justified in preventing resident companies obtaining tax relief on the basis of losses sustained by subsidiaries in other EEA States.[9] Put shortly, there is no obligation on Norway to allow a Norwegian-resident company to reduce its taxable profits in Norway by reference to losses sustained by a subsidiary in Denmark (in this case through the group contribution mechanism), unless those foreign losses are final, within the meaning of the Marks & Spencer case-law.

5. Notwithstanding the subsequent case-law, certain points of interpretation and application of the final loss exception have arisen in EHMN's appeal before the Borgarting Court of Appeal (*Borgarting lagmannsrett*) ("**the Referring Court**"). In particular, the Referring Court seeks to understand how strict is the requirement that the losses be "final." It wonders whether the existence of even minimal income in the year following the deduction (e.g. in the context of the trading and liquidation of EMD) will prevent a successful claim for relief.

6. In summary, and in answer to the questions referred, the Authority submits:

    a. Given the truly exceptional nature of the final loss exception, EEA States are entitled to deny relief in circumstances where there remains *a possibility* that losses may in some way be taken into account in the subsidiary's State of residence in future fiscal years. The case-law clarifies that such a possibility remains open where the subsidiary continues to receive income, however minimal. Accordingly, *in respect of a claim for relief for the 2012 fiscal year*, the continued receipt of income in 2013[10] means that the conditions for final loss relief are not met.

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[7] See e.g. Case E-15/16, *Yara*, para. 41.
[8] See e.g. Judgment of the CJEU of 3 February 2015, *European Commission* v *United Kingdom*, C-172/13, EU:C:2015:50 ("***Marks & Spencer II***"), paras. 27, 36.
[9] Cases E-15/16 *Yara*, C-172/13 *Marks & Spencer II*.
[10] In this case the continued trading of EMD in the first quarter of 2013, with definitive liquidation of EMD on 11 December 2013: Request, p.3.

b. States may require the liquidation of a subsidiary to be formally decided on immediately after the end of the fiscal year in which a deduction is claimed, in order to benefit from the final loss exception.

2 THE QUESTIONS REFERRED

7. The Referring Court asks the following questions:

1a. Is the application of the "final losses" exception as set out in the EFTA Court's judgment in Case E-15/16 Yara and the case law referred to therein precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed, or must a specific assessment be conducted to determine whether the subsidiary's continued income actually will reduce its losses, or that part of the losses for which a deduction is claimed?

1b. If the answer to question 1a is that a specific assessment must be conducted of the subsidiary's continued income, the EFTA Court is requested to indicate how probable it must be that the income actually will reduce the losses, whether the amount of the reduction is of any significance and which factors will be of particular relevance in the assessment.

2. Is it compatible with Articles 31 and 34 of the EEA Agreement to require as a prerequisite for the application of the "final losses" exception that the liquidation process be formally decided on immediately after the end of the fiscal year for which a deduction is claimed?

3 EEA LAW

8. Articles 31 and 34 EEA are relevant when answering the questions referred. Article 31 EEA provides that there shall be no restrictions on the freedom of establishment of EU or EFTA State nationals in the territory of any other of these States, and applies also to the setting up of agencies, branches and subsidiaries by such nationals. Article 34 EEA effectively extends this freedom from restrictions on establishment to companies or firms formed in accordance with the law of an EU or EFTA State.

4 NATIONAL LAW

9. At the relevant time (the 2012 fiscal year), the rules on group contributions were contained in Sections 10-2 to 10-4 of the Act of 26 March 1999 No 14 on taxation of assets and income[11] ("**the Tax Act**"). Such rules are set out at pp. 4-5 of the Request.

[11] *Lov 26. mars 1999 nr. 14 om skatt av formue og inntekt (skatteloven).*

10. Group contributions are value transfers between companies in a group which allow the transferor to claim a deduction in connection with its income tax assessment. The contribution is then deemed to be taxable income for the recipient. Group contribution rules typically aim to support tax neutrality - *within one and the same State of residence* - between undertakings which organise their business operations through departments in a single company and those which do so through several group companies.[12] A condition under Section 10-4 of the Tax Act, as it applied at the relevant time, was therefore that both the transferor and recipient of the group contribution were liable to taxation in Norway.

11. In light of the C-446/03 Marks & Spencer and E-15/16 Yara judgments, the Norwegian Supreme Court (*Norges Høyesterett*) ruled that the relevant Norwegian tax rules (and thus those at issue in the present case) must be interpreted and applied in accordance with EEA law: thus including that related to the final loss exception.[13] Further, Norway adopted new rules for cross-border group contributions in Section 10-5 of the Tax Act.[14] These rules permit such contributions in certain cases. The new rules however only take effect from the 2021 fiscal year and do not apply to the present case.

5 LEGAL ANALYSIS

5.1 Preliminary remarks and the exceptional nature of the final loss exception

12. It is settled case-law that rules such as group contribution or loss-relief rules may restrict the freedom of establishment of a parent company to set up subsidiaries in other EEA States.[15] Within the same State, these rules can confer a tax advantage, by e.g. speeding up loss relief, because the losses of a subsidiary can immediately be set off against the profits of other group companies – thus conferring a cash flow advantage. By denying this relief in a cross-border situation, the rules can make it less attractive to set up a subsidiary in another EEA State.[16]

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[12] See Judgment of 1 June 2022, Case E-3/21 *PRA Group Europe AS* v *the Norwegian Government, represented by the Tax Administration* ("***PRA Group***"), para. 17.
[13] Request, p.5, referring to the Norwegian Supreme Court judgment of 28 January 2019 (HR-2019-140-A *Yara*).
[14] Set out at pp. 6-7 of the Request.
[15] See e.g. E-15/16 *Yara*, para. 36, C-172/13 *Marks & Spencer II*, para. 23.
[16] See e.g. C-446/03 *Marks & Spencer*, paras. 32-33.

13. It is however also recognised that permitting deductions in one State for losses incurred in another can result in: (i) a loss of tax 'symmetry' in the first State (because profits and losses are two sides of the same coin); (ii) the risk that losses are (unfairly) used in both States; and (iii) the risk of tax avoidance, where losses are transferred to companies established in EEA States which apply the highest rates of taxation and in which the tax value of the losses is therefore the highest.[17]

14. It is therefore also settled case-law that restrictions on cross-border group contributions or loss-relief may be justified by overriding reasons in the public interest. The CJEU has held that such rules may be justified by the need to preserve the balanced allocation of powers of taxation between the EU Member States, the need to prevent the double use of losses, and the need to combat tax avoidance, taken together.[18] The EFTA Court referred to similar justifications at paragraph 38 of its judgment in Case E-15/16 Yara.

15. Thus, the intra-group contribution rules at issue in the present case would appear to be justified – in principle – by the abovementioned overriding reasons in the public interest. This is for the Referring Court to assess.

16. However, to the extent that the national rules do not provide for a final loss exception, such rules would, under the settled case-law of this Court and the CJEU, be disproportionate: they would go beyond what is strictly necessary to attain the legitimate objectives pursued.[19]

17. The Authority observes that, in the case at hand, the final loss exception (such as recognised in the case-law of this Court and the CJEU) appears to be available in Norway by means of the judicial interpretation and application of EEA law.[20] It appears that, in the years before legislative change in 2021, the final loss exception will effectively be 'read in' or applied to the relevant legislation by the judiciary.

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[17] See C-446/03 *Marks & Spencer*, paras. 42-51.

[18] See C-446/03 *Marks & Spencer*, para. 51 and C-172/13 *Marks & Spencer II*, para. 24. See also E-3/21 *PRA Group*, para. 41.

[19] See e.g. E-15/16 *Yara*, paras. 38-42, C-446/03 *Marks & Spencer*, paras. 55-56, C-172/13 *Marks & Spencer II*, paras. 26-27.

[20] As required by the judgment of the Norwegian Supreme Court in *Yara* (see paragraph 11 and the related footnote 13 above).

18. The Referring Court therefore seeks to understand the nature and limits of the final loss exception, in order correctly to apply it, and to determine whether it was lawful for the Tax Administration to refuse EMHN a deduction *on the basis that EMD had not sustained "final losses"* within the meaning of the Marks & Spencer case-law. Only if the losses are "final" will EHMN be entitled to claim relief on the basis that the rules are disproportionate (and therefore unjustified) as a matter of EEA law.[21]

19. In addressing this issue, and in answering the questions referred, the Authority recalls that the final loss exception is (as its name indicates) exceptional in nature. Thus, EEA law will only 'step in' to require relief when the losses are final. As observed by Advocate General Kokott in her Opinion in C-172/13 *Marks & Spencer II*:[22]

> "***By creating that exception in its judgment in Marks & Spencer, the Court wished to fill a gap***. *It considered that it was the duty of the European Union legislature to regulate cross-border relief in a manner consistent with the fundamental freedoms (See Marks & Spencer (C-446/03, EU:C:2005:763, paragraph 58)). Up to that point, the advantages of group relief were intended to benefit cross-border groups, at least to some extent,* ***where all other possibilities for taking losses into account were closed to them***."

20. Indeed, the wording used to formulate the exception in C-446/03 Marks & Spencer indicates that it was intended to apply in very limited circumstances. The CJEU held that national rules restricting cross-border loss relief would (only) go beyond what was necessary where:

> "– ***the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account*** *for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods,* ***and***
>
> – ***there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods*** *either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party*."[23]

21. The CJEU went on to observe at paragraph 58 of its judgment that it might be possible to identify *less restrictive measures than a general exclusion* from cross-border loss

[21] C-172/13 *Marks & Spencer II*, para. 27, referring to para. 56 of C-446/03 *Marks & Spencer*.
[22] Opinion of 23 October 2014, C-172/13, EU:C:2014:2321, para. 43, emphasis added.
[23] C-446/03 *Marks & Spencer*, para. 55, emphasis added.

relief (save for final losses), but that such measures would require harmonisation rules adopted by the EU legislature.[24] This indicates, as observed by Advocate General Kokott in Case C-123/11 A Oy, that in Marks & Spencer the CJEU wished to introduce an exception only of 'last resort'.[25] In other words, EU Member States were to be allowed to maintain a total ban on cross-border loss relief, subject only to the final loss scenario: the CJEU did not wish to enter into consideration of whether States could or should adopt measures less restrictive than this.

22. The CJEU continued to interpret the final loss exception restrictively in C-172/13 Marks & Spencer II:

> "[...] *it should be borne in mind that losses sustained by a non-resident subsidiary may be characterised as definitive, as described in paragraph 55 of the judgment in Marks & Spencer (EU:C:2005:763),* ***only if that subsidiary no longer has any income in its Member State of residence. So long as that subsidiary continues to be in receipt of even minimal income****, there is a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident (see judgment in A, EU:C:2013:84, paragraphs 53 and 54).*"[26]

23. In Case C-123/11 A Oy, the Member States participating in the procedure had submitted to the CJEU that the possibility of taking the Swedish subsidiary's losses into account continued to exist, *inter alia* because they could be "*deducted from the income,* ***admittedly very small****, which* [the subsidiary] *continues to receive in Sweden.*"[27] The CJEU did not appear to disagree with such an interpretation of the final loss exception, because it responded to such arguments that "[i]*t is* ***therefore*** *for the national court to determine whether A has in fact proved that B has exhausted all the possibilities of taking account of the losses which exist in Sweden.*"[28] Further, as

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[24] Paragraph 58 of the judgment in C-446/03 *Marks & Spencer* must be read together with paragraph 54 of that judgment, in which Marks & Spencer and the Commission suggested less restrictive alternatives than a general exclusion of relief, such as a conditional 'claw back' mechanism where any future profits of the subsidiary which did materialise would be incorporated into the taxable income of the parent company, up to the amount of loss relief previously claimed by the parent. The CJEU was (perhaps understandably) unwilling to 'prescribe' what such less restrictive alternatives should be.

[25] Opinion of 19 July 2012, C-123/11, EU:C:2012:488, para. 56: "*In Marks & Spencer the Court clearly wished to assume an exception only ultima ratio. That is shown by the fact that the Court saw the possibility of further, less restrictive measures which, however, it left expressly to the Union legislature to regulate.* [...] *The exception is formulated very restrictively for that reason. According to the judgment, there must be no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for past or future periods either by the subsidiary itself or by a third party.* [...]"

[26] C-172/13 *Marks & Spencer II*, para. 36, emphasis added.

[27] Judgment of 21 February 2013, *A Oy*, C-123/11, EU:C:2013:84, para. 53, emphasis added.

[28] *Ibid*, para. 54.

has been seen in paragraph 22 above, the CJEU in Marks & Spencer II later went on to confirm that the continued existence of even minimal income was problematic.

24. It is against this background that the Authority addresses the questions of the Referring Court.

5.2 Questions 1a and 1b – the receipt of even minimal income precludes the application of the final loss exception

25. By its Question 1a, the Referring Court asks whether the receipt of even minimal income in the fiscal year after the deduction is claimed will preclude the application of the final loss exception, or whether the national court must in some way assess the extent to which any income received will actually reduce the losses. In the event that such an assessment is required, Question 1b asks how probable it must be that the income will actually reduce the losses; whether the amount of any reduction is of significance; and which other factors are relevant to the assessment.

26. In light of the case-law set out at paragraphs 19-23 above, the Authority submits that the receipt of even minimal income by the subsidiary in the following fiscal year will preclude the application of the final loss exception. The Authority further refers to:

   a. Case C-650/16 Bevola, in which the CJEU reiterated that: "*losses* [...] *may be characterised as definitive only if that subsidiary no longer has **any** income in its Member State of residence. So long as that subsidiary continues to be in receipt of **even minimal income**, there is a possibility that the losses sustained may yet be offset by future profits made in the Member State in which it is resident.*"[29]

   b. Case C-608/17 Holmen, in which the CJEU held that losses would not be characterised as final if there were the possibility of deducting the losses economically by transferring them to a third party before the completion of the liquidation of the non-resident subsidiary. Accordingly, losses would only be final where "*the parent company demonstrates that it is **impossible for it to deduct those losses** by ensuring, in particular*

[29] Judgment of the CJEU of 12 June 2018, *Bevola A/S* v *Skatteministeriet* ("***Bevola***"), C-650/16, EU:C:2018:424, para. 63 (referring to C-446/03 *Marks & Spencer*, para. 55, and C-172/13 *Marks & Spencer II*, para. 36), emphasis added.

by means of a sale, that they are taken into account by a third party for future periods."[30]

27. Thus, as long as the subsidiary continues to receive income, however minimal, the *possibility* remains open that losses may in some way be taken into account in the subsidiary's State of residence in future fiscal years. In such circumstances, the losses will not be "final", and EEA States are, under the case-law, not obliged to grant relief. While Norway may decide of its own motion to be more generous – or less restrictive – about the circumstances in which it allows cross-border group contributions to be made,[31] it cannot be obliged to do so.

28. Consequently, where it is shown that income will continue to arise in a future fiscal year, the national court is not, as EEA law presently stands, *required* to make a more general assessment of the circumstances of the case – whether of the probability that the losses will actually be reduced, the amount of any reduction, or otherwise.

29. The Authority is conscious that the continued 'narrow application' of the final loss exception restricts the circumstances in which it will apply.[32] However, the language of the CJEU and this Court makes clear that, if the subsidiary in question continues to receive even minimal income in future income periods, there is the *possibility* that the losses might be offset in the future in some way. This possibility appears to be enough, on the case-law, for final loss relief to be precluded.[33] The rationale for this can be

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[30] Judgment of the CJEU of 19 June 2019, *Skatteverket* v *Holmen AB*, C-608/17, EU:C:2019:511 ("***Holmen***"), paras. 37-40 (quotation from para. 40, emphasis added).

[31] The Authority observes for example that the new Norwegian group contribution rules, which took effect from the 2021 fiscal year (Request, pp. 6-8), include what could be seen as a more 'generous' claw-back mechanism, of the type referred to in footnote 24 above. Under this mechanism, if income, assets or gains of the subsidiary arise in the fiscal year after that in which the group contribution is claimed, this will be treated as income of the parent (up to the amount of the group contribution originally claimed).

[32] *cf* the arguments of EHMN in relation to the principle of effectiveness, at p.13 of the Request.

[33] The Authority refers also to C-172/13 *Marks & Spencer II*, considered further under the second question below. In *Marks & Spencer II*, the European Commission alleged that the effect of the United Kingdom rules was to make it virtually impossible to obtain cross-border group relief (because, the Commission claimed, the subsidiary would need to enter liquidation *before* the end of the relevant loss-making year). The CJEU rejected the Commission's interpretation of the UK rules: it found that e.g. liquidation could be immediately *after* the relevant year end. It accepted such rules as lawful – even though they were only slightly less restrictive in nature than the effect of the rules the Commission had challenged. What is interesting for the present case is that the CJEU abstained from any *obiter dictum* that, if the rules *had* had the effect the Commission claimed, they would have been unlawful. Instead, at para. 36 of its judgment, it simply repeated the case-law that the existence of even minimal income in future precludes the possibility of final loss relief. This could be interpreted as 'leaving open the door' for States to adopt rules requiring liquidation before the end of the relevant tax year (precisely the scenario which the Commission had criticised as unduly restrictive). Indeed, as set out in paragraphs 37-38 below, in the later case of C-608/17 *Holmen*, the CJEU appeared to 'accept' rules of such a restrictive nature. This means that, under the current case-law, the circumstances in which States are required to grant the final loss exception are very limited indeed.

seen, in part, in C-650/16 Bevola. There, the CJEU observed that the risk of double deduction of losses disappears "[only] *where there is no longer* ***any possibility*** *of deducting the losses of the non-resident permanent establishment in the Member State in which it is situated.*"[34]

30. The Authority submits that the answer to Questions 1a and 1b is therefore that the application of the final loss exception, as referred to in Case E-15/16 Yara, is precluded where a subsidiary is in receipt of even minimal income in the fiscal year after the year for which a deduction is claimed.

5.3 Question 2 – States may lawfully require liquidation to be decided upon immediately after the end of the fiscal year in which the final loss deduction is claimed

31. The Authority recalls that, in the fiscal year in question (2012), the Norwegian group contribution legislation contained no final loss exception. Accordingly, *Norwegian legislation* contained no rules requiring a company to be liquidated in order to claim such loss relief (or to make the relevant cross-border group contribution).

32. The second question of the Referring Court must therefore be interpreted as asking whether *EEA law* requires that, in order to benefit from the final loss exception, the liquidation of any subsidiary must be decided upon immediately after the end of the fiscal year in which the 'final loss' deduction is claimed.

33. The Authority submits that there is no such requirement, as a matter of EEA law. However, should a State choose to adopt such a measure, it appears from the case-law that such a requirement would be lawful, as follows.

34. One way of being certain that losses are 'final' is to require that the company in question is liquidated. National provisions relating to liquidation have been considered in C-172/13 Marks & Spencer II and C-608/17 Holmen.

35. In C-172/13 Marks & Spencer II, the United Kingdom legislation required the determination of whether losses could be taken into account in future accounting periods to be made 'as at the time immediately after the end' of the accounting period

[34] C-650/16 *Bevola*, para. 58, emphasis added.

in which the losses were sustained.[35] The European Commission alleged that this effectively required the subsidiary to enter into liquidation *before* the end of the accounting period in which the 'final' losses were sustained – thus making it virtually impossible for the parent company to obtain relief, in breach of EU law.[36] The United Kingdom contested this interpretation of its legislation.[37] It provided the real-life example of a parent which had been able to claim cross-border group relief where, immediately after the end of the accounting period in which the losses were sustained, the subsidiary ceased trading and disposed of all its income producing assets.[38]

36. The CJEU accepted the arguments and explanations of the United Kingdom as to how its national law operated. Accordingly, it did not rule on the compatibility with EU law of a rule requiring liquidation of the subsidiary *during the period in which it sustained the (final) losses*. The judgment however makes clear that it is compatible with EU law to set the time for assessing whether losses are definitive as 'immediately after the end' of the loss-making accounting period. Accordingly, although this is not explicitly endorsed in the judgment, a rule requiring a decision to enter into liquidation immediately after the end of the relevant accounting period would also seem compatible with EU/EEA law. The Authority reaches this view also because in Marks & Spencer II:

    a. The CJEU reiterates the importance of the losses being definitive, and there being "*no longer any income*" in the subsidiary's home State.[39] This would suggest that a rule requiring liquidation immediately after the end of the relevant accounting period is compatible with this.

    b. The CJEU was aware that a practical consequence of the United Kingdom rule could be to require evidence of an intention to wind up a loss-making subsidiary and initiation of the liquidation soon after the end of the accounting period.[40] Again, nothing in its judgment suggests that this was unlawful.

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[35] C-172/13 *Marks & Spencer II*, paras. 5, 31.
[36] *Ibid*, paras. 14-15.
[37] *Ibid*, paras. 18, 35.
[38] *Ibid*, para. 37.
[39] *Ibid*, para. 36.
[40] *Ibid*, paras. 18, 37.

37. In C-608/17 Holmen, the relevant Swedish law on group (loss) relief required the subsidiary to have been placed in liquidation and the liquidation to have been completed, before final loss relief could be claimed.[41] The CJEU was not asked to rule on the lawfulness of the 'completed liquidation' requirement. In the Authority's view however, the CJEU implicitly accepted the lawfulness of this, when it made clear that losses would not be considered final if there were the possibility of deducting those losses economically by transferring them to a third party "*before the completion of the liquidation*."[42] In other words, by focussing its analysis on the situation *before* liquidation was completed, and in the absence of anything negative about the required timing of liquidation, the CJEU can be seen as having accepted such a timing requirement as lawful.

38. Thus, the CJEU has accepted the lawfulness of a national provision which was capable of requiring winding up immediately after the end of the fiscal year in which the losses were sustained (Marks & Spencer II). The CJEU has also implicitly accepted the lawfulness of national rules which required liquidation to have been completed before loss relief could be claimed (Holmen). In neither of these cases however (nor in C-446/03 Marks & Spencer or other relevant case-law) was a liquidation rule *required* by EU law.

39. The Authority accordingly submits that a 'liquidation-timing' rule of the type mentioned by the Referring Court is not an EEA law *requirement*. Thus, to the extent that no such rule existed in Norwegian law in the relevant fiscal year, the national court is not required to apply one *as a matter of EEA law*. To the extent however that Norwegian law requires a liquidation process to be formally decided on immediately after the end of the fiscal year for which a deduction is claimed, then such a requirement is compatible with Articles 31 and 34 EEA.

40. The Authority accordingly submits that, while such a rule is not required by EEA law, it is compatible with Articles 31 and 34 EEA for an EEA State to require, in order to demonstrate that a loss is final, that a liquidation process be formally decided on immediately after the end of the fiscal year for which a deduction is claimed.

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[41] C-608/17 *Holmen*, paras. 3-5 and see the Opinion of Advocate General Kokott of 10 January 2019 (EU:C:2019:9), paras. 8-9.
[42] C-608/17 *Holmen*, para. 37.

6 CONCLUSION

Accordingly, the Authority respectfully submits that the Court should answer the questions of the Referring Court as follows:

1. **Articles 31 and 34 EEA do not, in the circumstances of the main proceedings, preclude the application of national rules on intra-group contributions under which both the transferor and the recipient must be liable to taxation in the EEA State in question. However, such requirements are incompatible with EEA law where the loss sustained by the non-resident EEA subsidiary is final. Such loss will only be considered final where the parent company can show that its subsidiary has exhausted the possibilities of taking the loss into account and that there are no possibilities of the loss being taken into account in the subsidiary's EEA State of residence in future tax years either by the subsidiary itself or by a third party. The existence of even minimal income in the fiscal year after the year in which the deduction is claimed will prevent the loss being final.**

2. **It is compatible with Articles 31 and 34 EEA for an EEA State to require, in order to demonstrate that a loss is final, that a liquidation process of the subsidiary be formally decided on immediately after the end of the fiscal year for which a deduction is claimed.**

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